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FILED
AUG 11 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. — 256

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners*,

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

THOMAS F. MURPHY,
*Wellsboro, Pennsylvania;*
GEORGE I. PUHAK,
*Hazelton, Pennsylvania;*
CARROLL L. BEEDY,
WARREN E. MAGEE,
PRESTON B. KAVANAGH,
*Washington, D. C.;*
*Attorneys for Petitioners.*

August 11, 1943.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners*,

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THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

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Petitioners, Mary S. Whitmore, Robert Simpson, Louise Fillebrown Murtaugh and Sue M. Strous, Executrices of the Estate of Henry Rose, deceased, Edward L. McKenzie; Peoples Pittsburgh Trust Company, Executor of the Estate of C. Louis McKenzie, deceased; Fayette A. McKenzie, John Simpson and Lilly S. Culver, the next-of-kin of Marion S. Siemens, deceased, respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the

Supreme Court of Pennsylvania, Eastern District, entered March 22, 1943, affirming the decree of the Orphans Court of Tioga County, Pennsylvania, dismissing petitioners' contentions and exceptions and adjudicating that Marion S. Siemens died testate as to the residue of her estate, that the trust estate of the decedent blended with and became a part of her individual residuary estate, and that the respondent, The Pennsylvania Society for the Prevention of Cruelty to Animals, a corporation, was entitled to such residuary estate.

**The Opinions Below.**

The opinion of the Orphans Court of Tioga County dismissing petitioners' petition for a construction of the Will of Marion S. Siemens, deceased (R. 234a-242a) is reported in 42 D. & C. 708.

The opinion of the Orphans Court of Tioga County awarding *nisi* the residue to the respondent (R. 334a-352a) has not been reported.

The opinion of the Orphans Court of Tioga County rejecting petitioners' offer of proof (R. 365a-368a) has not been reported.

The opinion of the Orphans Court of Tioga County overruling petitioners' exceptions and awarding the residue to respondent (R. 442a-459a) has not been reported.

The opinion of the Supreme Court of Pennsylvania (R. 515-518) is reported in 346 Pa. 610.

**Jurisdiction.**

The opinion and decision of the Supreme Court of Pennsylvania was entered on March 22, 1943 (R. 515-518). A Petition for Rehearing was timely filed on March 30, 1943 (R. 519-524). The Petition for Rehearing was considered and denied by the Supreme Court of Pennsylvania on April 19, 1943 (R. 525). This Court, for good cause shown,

on June 23, 1943, granted petitioners until August 18, 1943 within which to file this Petition for Certiorari (R. 530). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 344(b)).

**Summary Statement.**

This case presents for correction errors of the Orphans Court of Tioga County, erroneously affirmed by the Supreme Court of Pennsylvania, which denied petitioners due process of law and deprived them of a fair trial.

There was general recognition below of the basic proposition of law advanced by petitioners, that where there is *patent* ambiguity because of lack of the certainty required in a will, in the attempt to designate a residuary legatee, the residuary clause is void. The sole judge of the trial court also recognized the long established rule of law to be that extraneous evidence is not admissible upon such ambiguity. He also conceded that there was nothing elsewhere in the will or codicils here involved to throw any light upon the words for which a naked abbreviation was intended by testatrix to stand. In proceedings in the same estate during which each of two societies (one being respondent and the other Women's *Pennsylvania Society for the Prevention of Cruelty to Animals*) was claiming that it was the residuary legatee named by the naked abbreviation, the judge conclusively showed by his orders and opinions that he recognized the ambiguity as *patent*. When petitioners learned of their rights they promptly instituted proceedings for construction in which proceedings they clearly showed their intention when their rights were judicially declared to challenge prior administration orders. *There is nothing in the record to show that the testatrix was aware of respondent's existence or in any way interested in animal welfare.* The interesting and novel ques-

tion presented is whether or not, under such circumstances, a judge may utilize the doctrine of judicial notice to bypass and circumvent the recognized rule of law that judicial notice may not be exercised where the record shows doubt in the mind of the judge.

Further questions are presented of whether or not a state trial court may, under the guise of judicial notice, deprive petitioners of their day in court and their right to produce evidence concerning an abbreviation used by the testatrix in the residuary clause of her will and whether that residue included a separate trust estate.

Marion S. Siemens made her will on September 22, 1936 (R. 12a). On November 30, 1936 she conveyed more than half of her entire estate [1] to Trustees (R. 13a-17a).

The trust instrument reserved power to appoint by will as to the corpus of the trust, but that power was limited to natural "persons", because the trust instrument later distinguishes between persons, partnerships, and corporations (R. 15a).

The trust instrument contained no general provision for disposition of corpus in event of failure to appoint by will, but here also limited the purpose for which corpus should be included in the general estate, on failure to appoint by will, to such inclusion for determination and payment of the trust estate's proportionate share of taxes (R. 16a).

Neither the will (R. 10a) made before, nor three codicils (R. 18a-21a), made thereafter, refer to the trust.

Testatrix died, domiciled in Tioga County, on October 26, 1939, leaving an individual estate exclusive of the trust estate, which was ample to pay debts, all legacies in her will and codicils and leave a substantial residue. Decedent's

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[1] The trust estate was appraised at $396,448.21 (R. 25a, 53a), all cash, stocks and bonds. Her separate individual estate was appraised at $322,511.53, of which $303,401.53 was personalty (R. 25a, 39a) and the balance was realty (R. 25a, 64a-65a).

will and three codicils were probated in the Orphan's Court of Tioga County (R. 23a) on November 6, 1939. The Orphans Court of Philadelphia County (the situs of the trust), on testatrix's death, examined the will of decedent and awarded to the executors of that will, custody of the trust corpus, "same to be held *segregated*[2] from her individual estate and accounted for as a *separate* fund" (R. 22a-24a).

In addition to showing great care in naming many natural persons, the three institutions named reflected even greater care in designation, as testatrix gave lengthy names and the city or town of location in every instance thus: "Vestry and Wardens of St. Pauls Church *of Wellsboro, Pa.*" "The Childrens Country Week Assn. *of Philadelphia*" and "Soldiers & Sailors Hospital *of Wellsboro*" (R. 10a-11a).

The residuary clause, however, was *ambiguous* on its face, in that it contained an abbreviation composed of a contraction of the name of a state followed by four single letters, thus:

> "The residue of the estate to be paid to the *Penna. S. P. C. A.;* requesting that they give all the attention possible to work in Tioga Co."

At the request of respondent the other claimant and the executors a determination of the ambiguity in the residuary clause was deferred, notwithstanding that an early adjudication was necessary for proper administration (R. 86a, 87a).

Petitioners are decedent's next-of-kin and would take in event of intestacy. They are aged and reside in four states. When they learned of the administration proceedings on this estate, and the ambiguity in the residuary clause of the will, they promptly sought a construction of the will (R. 181a).

Both societies claimant filed *identical* demurrers in which each admitted that the residuary clause was ambiguous and

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[2] Italics ours unless otherwise stated.

contended that the residue had been left to a charity and therefore should not be declared void (R. 205a, R. 207a). These societies likewise contended, as other charities might claim under the residuary clause, that the only proper proceeding for a construction of this ambiguity would be one involving notice to all charities who might wish to claim (R. 205a, 207a). The Orphans Court dismissed the application of petitioners for a construction of the will, but in doing so recognized that the residuary clause was ambiguous and concluded that the question of whether the testatrix died intestate as to residue or the residue went to charity "goes to the very core of the ultimate question" (R. 237a).

Petitioners then instituted in the administration cause a proceeding for the construction of the Will and gave notice thereof by publication to all who might claim thereunder (R. 243a). At the scheduled hearing, the Women's *Pennsylvania Society for the Prevention of Cruelty to Animals* withdrew as a claimant in favor of respondent and the judge, who had so recently defined the "core of the ultimate question", and the respondent agreed with each other that, upon further consideration there was nothing in the will upon which to predicate a charitable use. Thereupon, respondent ignored its former admission of ambiguity and asked the Orhpans Court to take judicial notice that the abbreviation in the will "can have only one possible meaning" and offered evidence to sustain its claim.

The Orphans Court, recognizing the long established law of Pennsylvania, which is also the general law of the land, to be that extraneous evidence was inadmissible except to cure a *latent* ambiguity (R. 338a), conceded that there was no *latent* ambiguity (R. 340a) and that there was nothing in the will or codicils to explain the words which the testatrix intended by the abbreviation (R. 334a), nevertheless, admitted and considered (R. 348a) respondent's evidence, over the objections and exceptions of petitioners,

*provisionally,* and announced that it would later decide whether the evidence was inadmissible and if not admissible would strike it from the record (R. 267a-277a). When the court announced it would consider evidence, petitioners then asked to be permitted to put in evidence on their behalf and in rebuttal (without petitioners abandoning the rights reserved on their exceptions that no evidence was admissible as the ambiguity here involved was *patent*). The Orphans Court refused to allow petitioners to put in any evidence on the ground that any evidence concerning this ambiguity was inadmissible (R. 366a) (ostensibly because the ambiguity was patent) and *thereupon ruled that the court would judicially notice that the abbreviation meant respondent* (R. 366a).

Petitioners' position was, that until the court ruled whether any evidence would be received, they would withhold all evidence concerning the ambiguous residuary clause (R. 359a, 360a, 361a). Without announcing any ruling on the reserved question, the Orphans Court filed its findings of fact, conclusions of law and a decree, awarding nisi the residue of the estate, including in that residue the trust estate of the decedent, to the respondent (R. 331a-352a).

The court took the position that it would not receive "extrinsic evidence to determine to whom the testatrix meant to give" (R. 340a) and then upon the theory that "judicial notice is neither evidence nor proof," (R. 343a) *received respondent's evidence "for the purpose of informing the mind of the court"* (R. 348a) and refused evidence offered by petitioners for that very purpose (R. 366a). Thus the court considered the evidence offered *provisionally* by respondent and *from that evidence* concluded that the abbreviation "Penna. S. P. C. A." was "used by the testatrix to mean the respondent" and awarded *nisi* the residuary estate to it (R. 351a, 252a). Without any evidence whatsoever before it concerning the trust estate, that estate

was included by the Orphans Court as a part of the residue passing to respondent.

Thereupon, petitioners pointed out to the Orphans Court that there was no basis for the finding that the trust estate was a part of the residue passing under the will, as the trust instrument was not before the court, the court had not read it and no evidence had been received concerning it (R. 353a-356a).

Further, petitioners moved to annul the adjudication *nisi* and reopen the hearings, and pointed out to the court that it had received the evidence offered by respondent at the preliminary hearing *provisionally* and had failed to advise petitioners of its ruling on the *reserved* question of law. Hence, petitioners had refrained from offering proofs as to the meaning of the word "residue" in the will and evidence concerning the ambiguous residuary clause and asked that they be permitted to offer proofs in support of their side of the case (R. 358a). In support of this motion, petitioners offered to prove the following facts (R. 363a):

> (1) That there is practically no need within this jurisdiction for the work conducted and carried on by the Pennsylvania Society for the Prevention of Cruelty to Animals, claimant under the will.
>
> (2) That the decedent, Marion S. Siemens, was not interested in animal welfare work, and that she was not interested in animals.
>
> (3) That there are in fact other societies and associations whose initials are "S. P. C. A."
>
> (4) That such charitable interests as the testatrix had were not eleemosynary.
>
> (5) That "Penna. S. P. C. A." was not in fact of such general and public notoriety within the limits of the jurisdiction of this Honorable Court that the average man and woman recognized such an appellation as meaning, or applying to the Pennsylvania Society for

the Prevention of Cruelty to Animals, claimant under the will.

(6) The facts as to the family status and relationship of decedent, her property and her interests and any other matters properly admissible as surrounding circumstances.

The Orphans Court in its opinion refusing petitioners the right to put in any evidence in support of their case or in rebuttal held (R. 365a-366a):

> "* * * we agreed with these petitioners that evidence to show the intent of the testatrix was not admissible, and that if the object of her bounty could not be determined from the four corners of the will, the residuary estate must go to the next-of-kin. Such evidence of the Society claimant (respondent) as was received was for the sole purpose of enlightening the mind of the court as to the meaning of the abbreviation used to aid us in the exercise of our duty to take judicial notice * * *. Evidence to show the intent of the testatrix *would have been rejected if offered* * * *."

The court adhered to its erroneous position that it would judicially notice that the abbreviation meant respondent (R. 368a).

Thus, while respondent was given the opportunity to put in evidence for the "purpose of enlightening the mind of the court," petitioners were denied that right, as they offered to prove (R. 364a) that the abbreviation "was not in fact of such general and public notoriety within the limits of the jurisdiction * * * that every man and woman recognized such an appellation as meaning, or applying to" respondent, and that "there are in fact other societies and associations whose initials are 'S. P. C. A.'."

Petitioners excepted to this action of the court (R. 368a) and again requested opportunity to put on their evidence (R. 369a).

Whereupon, the Orphans Court ruled that it would not vacate the order *nisi* it had entered in favor of respondent and ruled "if there is any error or omission in the findings of fact or conclusions of law, questions with reference thereto may be raised on exceptions before final confirmation" (R. 370a).[3]

Accordingly, in accordance with the ruling of the court, petitioners renewed all of their exceptions and when the case came before the court for final adjudication, renewed their offers of proof and submitted proposed findings in connection therewith (R. 395a-438a). At that final hearing, petitioners' exceptions were overruled and their offers of proof were rejected (R. 458a, 459a). The court adhered to its position that it would judicially notice that the respondent was entitled to the residue of the estate, including therein the trust estate of decedent (R. 442a).

The actions of the trial court clearly show the receipt of evidence offered by respondent and a refusal to hear evidence of petitioners, including evidence which would definitely refute the evidence of the respondent. Hence the decree in favor of the respondent awarding it in excess of $300,000.00 is based upon an incomplete and improper record. Moreover, the trial court seems unquestionably to have taken the position that the ambiguity here involved was *patent*, that *no* evidence would be received as to what the testatrix intended when she wrote the abbreviation, and yet received and considered evidence of respondent and utilized a substitute for evidence, judicial notice, in order to render a decree in respondent's favor. Such a situation clearly presents a denial of due process of law, a denial of

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[3] While the court took the position that petitioners' attempt to prove their side of the case were an "anamaly" (R. 366a) and an attempt "to dally with the processes of the law," on application of the executors and respondent, the court did not hesitate on several occasions to modify its order *nisi* to correct errors and mistakes made on the part of the executors (R. 393a).

a fair trial to petitioners and an illegal adjudication based upon an insufficient, incomplete and improper record. A more subtle method of depriving a litigant of his day in court and a full and fair trial is hard to conceive. Such manifest errors should not be permitted to stand uncorrected and this Court should exercise its supervisory power to prevent the reoccurrence of such an unconstitutional trial in order that the purity of our judicial system may be preserved in the public interest.

On appeal, the Supreme Court of Pennsylvania affirmed the actions of the Orphans Court in awarding the residue to respondent, and thus sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's powers of supervision and correction.

*It is significant to note that the Collector of Internal Revenue considered the ambiguous language of the residuary clause of the Will insufficient to establish a bequest to a charity and assessed an additional Federal Estate Tax of $41,724.68 against this estate "on the assumption that the residuary estate will go to the next-of-kin" (R. 394a). If respondent prevails, the United States will be erroneously deprived of Federal taxes totalling $41,728.68, and interest thereon, and at a time when the Nation is in the greatest financial need.*

**Questions Presented.**

1. Whether the procedure and the conduct of the Orphans Court of Tioga County so departed from the accepted and usual course of judicial proceedings that it constituted a denial of due process of law and as such would call for the exercise of this Court's power of supervision.

2. Whether the Supreme Court of Pennsylvania has sanctioned such a departure by the Orphans Court from

the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

3. Whether, after a ruling to the effect that the ambiguity involved in the residuary clause in the Will in question was *patent* and that no evidence was admissible to establish the intention of the testatrix or to clarify the ambiguity, a court may then take judicial notice of what the testatrix intended in such *patent* ambiguity.

4. Whether a court may take under advisement the question of whether or not in construing an ambiguity in a will, any evidence at all is admissible, receive evidence of the proponent provisionally and then, without affording the right to the other party to produce evidence, accept the evidence *provisionally* received and that supplied by judicial notice, a mere substitute for evidence, and determine the intention of the testatrix according to the whim and caprice of the particular judge hearing the case.

(a) Whether such a practise is such a departure from recognized judicial processes as to amount to a denial of due process of law.

(b) Whether such a determination is not an improper decision based upon an incomplete and improper record and, therefore, a denial of due process of law.

5. Whether petitioners' petitions and motions for an adjudication that the residuary clause was void for *patent* ambiguity should have been granted.

6. Whether in view of the fact that the record disclosed conflicting claims and the possibility of other conflicting claims of persons who might be identified with the abbreviation and letters appearing in the residuary clause and an admitted doubt as to what was intended by the residuary clause, a court by the exercise of judicial notice could

determine that doubt *without any evidence whatsoever concerning the history and background of the testatrix and the facts and circumstances surrounding the making of her will.*

7. Whether it was error and a denial of due process of law to refuse petitioners' offers of proof concerning abbreviation and letters used in the residuary clause of the will.

8. Whether it was error to refuse to receive evidence offered by petitioners concerning the ambiguity involved in the will and then to use evidence (that of respondent and judicial notice) to determine such admitted ambiguity.

9. Whether a state court may decree that a trust estate passes under a will, when the will makes no reference to the trust, the trust instrument is not in evidence and no evidence was received concerning it.

**Specification of Errors To Be Urged.**

The court below erred:

1. In denying petitioners contentions that the residuary clause of the will in question was void for patent ambiguity.

2. In awarding the residue of decedent's estate to respondent.

3. In including in the residuary estate the trust estate of the decedent.

4. In receiving evidence of respondent.

5. In receiving evidence of respondent to assist the court in determining the meaning of the abbreviation used and in refusing to receive evidence for that very purpose offered by petitioners.

6. In judicially noticing the ultimate fact in issue, the intent of the testatrix, and in judicially noticing that the naked abbreviation used by the testatrix meant respondent.

7. In allowing respondent to offer full proofs and in denying the same rights to petitioners.

8. In sanctioning such a departure on the part of the Orphans Court of Tioga County from the usual course of judicial proceedings as to constitute a denial of due process of law, denial of a fair trial, resulting in an improper decision based upon an incomplete and improper record.

**Reasons For Granting the Writ.**

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. A state court has decided Federal questions of substance under the Constitution in a manner not in accord with the applicable decisions of this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and on appeal the Supreme Court of Pennsylvania has sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has not given proper effect to applicable decisions of this Court.

1. Neither the Orphans Court of Tioga County, nor the Supreme Court of Pennsylvania, gave proper effect to the decision of this Court in *Brown* v. *Piper,* 91 U. S. 37, when those courts held that in cases of a patent ambiguity, apparent upon the face of the will, judicial notice could be exercised to resolve such patent ambiguity and in such circumstances of admitted doubt the next of kin are not en-

titled to offer evidence. In the *Brown* case, this Court made it perfectly plain that the exercise of judicial notice is a mere substitute for evidence. In listing situations in which judicial notice may be taken, this Court limited those situations to "facts of universal notoriety" and "whatever is generally known within the limits of a particular jurisdiction." The *Brown* case is no authority for the proposition that the ultimate fact in issue may be judicially noticed in favor of one litigant against another. On the contrary, this Court has made it plain that judicial notice is to be used only as a substitute for evidence concerning universally notorious or generally known facts, and in all events is to be exercised with caution. In that connection, this Court squarely held in the *Brown* case (p. 43);

> "Every reasonable doubt upon the subject should be resolved promptly in the negative."

Not only do the pleadings and the proofs in this case show doubt as to the meaning of the abbreviation in question, but that doubt is established by the court's actions in the case. Thus, in ruling on the first application of petitioners for a construction of the will, the court in its opinion indicated that the language involved could be identified with several "prospective claimants" (R. 235a) and "there is a possibility that some society other than those named may make claim under the will." That clearly manifests the absence of the requisite "notoriety" and the existence of a "reasonable doubt" which precludes the exercise of judicial notice.

Here respondent had and assumed the *burden* of establishing that it was *the* residuary legatee *intended* by the abbreviation (R. 255a). In such a situation, we submit that judicial notice is unavailing to rid respondent of its burden. The rule announced by this Court in *Shapleigh* v. *Mier*, 299 U. S. 468, is of perfect application. There this

Court, after characterizing an attempt to supply the basic fact in issue by judicial notice as an attempt to supply a "crutch on which to lean", held (p. 475):

> "Heed must be given to the *burden of proof,* at least where other tests are lacking, * * * petitioners must recover, if at all, on the strength of their own title. *Judicial notice is unavailing to rid them of that burden.*"

While the decisions below pay "lip service" to the decision of this Court in the *Brown* case, we submit that they did not give proper effect to that decision, are contrary thereto, and the question involved is one of substance concerning the right of a litigant, under the Federal Constitution, to have issues tried in a state court in accordance with the requirements of due process and in a truly judicial manner.

2. Petitioners have been deprived of due process of law contrary to the Fourteenth Amendment because the case has been decided against them without their ever having the opportunity to present their evidence. Such a denial of due process warrants Certiorari. *Saunders* v. *Shaw,* 244 U. S. 317.

When the case came on for hearing in the Orphans Court upon the application of petitioners for a construction of the will, two societies[4] *each* claimed to be the legatee described by the abbreviation in the residuary clause here involved. One society for the prevention of cruelty to animals *"withdrew" in favor of the other* (R. 251a). We submit such action obviously was but a studied attempt on the part of the two societies to eliminate the *patent* ambiguity involved in the abbreviation by eliminating the opposing contentions of the *two* societies having similar names as

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[4] Respondent and the Women's *Pennsylvania Society for Prevention of Cruelty to Animals.*

to what the abbreviation meant. That these societies were collaborating is obvious. Thus prior to this "withdrawal" of one *in favor of the other* they had filed *identical* pleadings (cf. R. 205a with R. 207a).

On the "withdrawal" of the claim of one of the societies for the prevention of cruelty to animals, the other admitted that it had the burden of establishing that it was intended by the abbreviation (R. 255a). It thereupon proceeded to offer evidence (R. 267a). Petitioners objected to any evidence upon the grounds that an abbreviation standing alone could have no meaning; that in the English language in contrast to such language as Chinese, where the single character is comparable to our word, the word is the smallest unit of idea value, and hence whenever an abbreviation is presented the problem is to ascertain the words for which the abbreviation stands; that the problem may be resolved only by the context or setting to suggest the words intended by the testatrix; that the existence of ambiguity was emphasized by the fact that three of the single letters of the abbreviation, "S. P. C.", could stand for "St. Paul's Church", one of the legatees mentioned in the will; that as another specific bequest had been made to a Children's Aid Society, there was some degree of similarity between the abbreviation and the words, "Pennsylvania Society for the Promotion of Children's Aid" or the "St. Paul's Cemetery Association"; that in view of the meticulous care which the testatrix had used to designate specific legatees, it was obvious that there was a patent ambiguity in the residuary clause; that respondent did not offer to explain what words were intended by anything contained in the will or in the circumstances surrounding its execution or by anything connected with the testatrix, thus conceding it was impossible to so ascertain the words intended; that the unquestionable law in Pennsylvania, as well as elsewhere, did not permit the admission of evidence where the

ambiguity was patent; that judicial notice was merely an expedient method for dispending with extraneous evidence to establish an *unquestionable* fact; that the power of the court to exercise judicial notice, under the basic law of the land, could not be tortured into the power to circumvent the taking of evidence concerning disputed facts or to establish the ultimate fact in issue, and that doubt existed concerning the meaning of the words for which the abbreviation stood, which doubt was manifested in all prior activities of the court, the executors and respondent; and, therefore, the court should rule that the ambiguity was *patent* and should decide that the decedent died intestate as to the residue of of her estate, which would dispense with the necessity of deciding whether the trust estate of decedent blended with her individual estate.

Thereupon, the court admitted that there was serious question concerning the admissibility of any of the evidence offered by the respondent and stated that it would take that evidence provisionally and under advisement, and in the event it decided that such evidence was inadmissible, it would be stricken from the record (R. 267a-277a). Relying upon this provisional ruling, petitioners merely offered evidence establishing that they were the next of kin of the decedent.

Thereafter, without informing petitioners of its ruling upon the reserved question of whether or not the ambiguity involved was patent, and whether or not any evidence would be received, the Orphans Court filed its findings of fact, conclusions of law, and entered thereon a decree (R. 331a-352a) holding *nisi* that the respondent was entitled to the residue of the estate and arbitrarily included in that residue the trust estate of the decedent. This action in including the trust estate was obviously taken upon an improper record as the trust instrument had not been offered in evidence and was not before the court for a construction (R. 353a).

Reserving their exceptions, promptly thereafter petitioners sought the right to offer evidence in support of their case and in rebuttal (R. 363a-364a) [5] and in the meantime had procured and filed with the court the trust agreement. The Orphans Court denied petitioners the opportunity to produce any evidence whatsoever or to be heard concerning the trust agreement, and took the position for the first time that petitioners' objections to the receipt of any evidence should be sustained and that no evidence was admissible to establish the meaning of the abbreviation contained in the residuary clause (R. 365a-366a). Thereupon, the Orphans Court refused to receive any evidence pertinent to petitioners' offers of proof and announced that it would *use respondent's evidence to inform the court* and judicially notice that the abbreviation in the residuary clause meant the respondent (R. 366a). On appeal the Orphans Court was affirmed in all respects (R. 518).

As the offers of proof of petitioners unquestionably concerned links in the chain of evidence pertaining to the issues involved, it was prejudicial error for the court to receive evidence on behalf of respondent, *base its decision in respondent's favor entirely upon that evidence*, and then refuse petitioners the opportunity to present *any* evidence under the guise that it based its decision upon judicial notice. *Such procedure is a denial of due process and a sufficient basis for Certiorari. Saunders* v. *Shaw*, 244 U. S. 317, 319; *McCandless* v. *United States*, 298 U. S. 342, 346.

The *Saunders* case involved a procedural situation almost identical with that here involved. In that case this Court said (R. 319):

> The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should

[5] Offer of proof appears at pages 8 and 9, supra.

be granted. He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principal of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

This Court made it perfectly plain in the *Saunders* case that a denial of the rights given by the Fourteenth Amendment need not be by legislation and can arise from the actual conduct of a judicial proceeding in a state court. In such a situation this Court said that there would be a serious gap in the remedy for an infraction of constitutional rights if the parties aggrieved in such a way could not come to this Court.

In reversing a rejection of an offer of proof in the *McCandless* case, this Court held (R. 346):

> "If it be an appropriate *link* in the chain of proof, that is enough. * * * (p. 347) the well settled rule (is) that an erroneous ruling which relates to the substantial rights of a party is ground for reversal * * *."

This Court then ruled (p. 348) that the rejection of the offer of proof made in the *McCandless* case "could not be otherwise than prejudicial." A comparison of the offer made there with that here will demonstrate that petitioners were prejudiced and denied a fair trial below.

We submit that the actions of the Orphans Court in this case, which were sanctioned and approved by the Supreme Court of Pennsylvania, deprived petitioners of due process of law, contrary to the Fourteenth Amendment, and should be reviewed by this Court.

3. The decision of the Orphans Court and the affirmance of that decision by the Supreme Court of Pennsylvania, were based upon improper records and, therefore, represent such a departure from the accepted and usual course of judicial proceedings as to constitute a denial of due process of law guaranteed by the Fourteenth Amendment, and as such call for the exercise of this Court's power of supervision and correction. Regular judicial proceedings do not contemplate a decision of the utlimate issue in a case before the evidence of all the parties is before the court. As the court in this case took under advisement the question of the admissibility of any evidence, it certainly should not reach a decision predicated upon the evidence of respondent alone, when the petitioners were not afforded the opportunity to present their evidence.

This Court has made it plain that it will not tolerate a "procedure" and "course of litigation" in a state court that does not satisfy the "requirements of due process" guaranteed by the Constitution. *Hansberry* v. *Lee*, 311 U. S. 32, 43, 44.

In the *Hansberry* case this Court granted certiorari to review (p. 38) and reviewed and reversed a "res adjudicata" ruling of a state court, purporting to bind "class"

members, on the ground the "class" members, who did not appear did not have "representation," had not been heard and held (p. 45):

> "Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer, who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of litigants. *Tumey* v. *Ohio*, 273 U. S. 510."

Thus, where a party is not present and has not put in his evidence, a judgment against such a party would not satisfy the requirements of due process. It follows that, *if present*, yet a party is *denied the opportunity to present his evidence*, a judgment against such a party likewise would not satisfy the requirements of due process.

Petitioners were not bound to contemplate a decision of this case, solely upon the evidence of respondent or under the guise of judicial notice, before their evidence was heard. *Saunders* v. *Shaw*, 244 U. S. 317, 320.

If any evidence is to be received to aid the court in determining the intent of the testatrix in using the abbreviation in question, we submit that the basic concept of a constitutional judicial proceeding contemplates that the evidence of petitioners be received, as well as the evidence of respondent. This Court so held in the *Saunders* case.

We think it beside the point for the court to state that no evidence was admissible to aid the court in determining the ambiguity involved and then to state it could judicially notice the ultimate fact in issue, the reason being that if no evidence was admissible to aid the court in determining the intent of the testatrix, the ambiguity is *patent* and,

therefore, the bequest is void for uncertainty and the residue of the testatrix's individual and trust estate should have been awarded to petitioners as her next of kin.[6]

This Court has strongly condemned as a denial of due process of law decisions based upon improper records, such as the record here involved, where all relative evidence is not before the court, particularly where such evidence has not been produced because of some ruling in the trial court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Saunders* v. *Shaw*, 244 U. S. 317; *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 268; *U. S.* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 423, 424; *Willing* v. *Binenstock*, 320 U. S. 272, 277. The Circuit Courts of Appeal repeatedly have recognized the rule so clearly enunciated by this Court[7] and its infraction here is so flagrant as to call for the exercise in the public interest of the supervisory and remedial powers of this Court.

The argument that as the residue is left to charity, intestacy is defeated, is specious as the respondent and the trial judge agreed (R. 266a) and the trial judge so found (R. 452a). There is nothing in the residuary clause to show the bequest is to charity. The legatee vainly attempted therein to be named is designated by a naked abbreviation, void for *patent* uncertainty; hence the attempt to inject into

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[6] *Torbet* v. *Twining*, 1 Yeates 432, 439; *McDermott* v. *U. S. Insurance Co.*, 3 S. & R. 603, 606; *Iddings* v. *Iddings*, 7 S. & R. 111, 113; *Ritter* v. *Fox*, 6 Wharton 99, 107; *Comfort* v. *Mather*, 2 W. & S. 450, 453; *Trustee* v. *Sturgeon*, 9 Pa. 321, 327-328; *Kelley* v. *Kelley*, 25 Pa. 460, 462; *Brooklyn Trust Co.* v. *Warrington*, 277 Pa. 204, 208; *Hughes's Estate*, 319 Pa. 326, 329, and see *Clayton* v. *Nugent*, 13 Mees. & W. 200, 153 Eng. Reprint 83.

[7] *Fifth Third National Bank* v. *Johnson*, 219 F. 89, 95; *Columbus Gas & Fuel Co.* v. *City of Columbus*, 55 F. 2d 56, 57; *Faulks* v. *Schrider*, 99 F. 2d 370, 373; *Hughes* v. *Reed*, 46 F. 2d 435, 442, 443; *Wilson* v. *Spencer*, 261 F. 357, 368; *Underwood* v. *Comm. of Internal Revenue*, 56 F. 2d 67, 72, 73; *Finefrock* v. *Kenova Mine Car Co.*, 22 F. 2d 627, 634; *Hamilton Gas Co.* v. *Watters*, 75 F. 2d 176, 182.

the case the contention that the bequest is to charity is without merit and may be characterized as an attempt on the part of respondent and the courts below to lift the case by its proverbial "boot straps."

**Conclusion.**

It is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the Supreme Court of Pennsylvania, Eastern District, should be granted.

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August 11, 1943.